



## Office of the General Counsel

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**RE: Notice of Proposed Rulemaking on “Circumvention of Lawful Pathways”; CIS No. 2736-22, Docket No: USCIS 2022-0016, A.G. Order No. 5605-2023**

Dear Mr. Delgado and Ms. Alder Reid,

The United States Conference of Catholic Bishops (“USCCB”) appreciates the opportunity to provide public comment and share our grave concerns with the Department of Homeland Security (“DHS”) and the Department of Justice (“DOJ,” collectively “the Departments”) regarding the above-referenced Notice of Proposed Rulemaking (“NPRM” or “Rule”) concerning eligibility for asylum published in the Federal Register on February 23, 2023.<sup>1</sup>

The Catholic Church holds a strong and pervasive pastoral interest in the welfare of migrants, including asylum seekers, and welcomes newcomers from around the world. For decades, the USCCB has collaborated with the U.S. government to welcome and manage the provision of services to refugees, asylees, unaccompanied migrant children, domestic and foreign-born victims of human trafficking, Cuban and Haitian entrants, and others. The USCCB’s Department of Migration and Refugee Services administers programs for and advocates on behalf of these and other populations to advance the priorities of the USCCB’s Committee on Migration and promote the teachings of the Gospel.

The Catholic Church’s work assisting newcomers stems from the belief that every person is created in God’s image and imbued with an intrinsic dignity. In the New Testament, the image of the migrant is grounded in the life and teachings of Jesus Christ. Throughout his ministry, Christ identified himself with newcomers and with other marginalized persons, stating: “I was a stranger and you welcomed me.”<sup>2</sup> The Church does recognize the right of countries to uphold their borders as an exercise of their sovereignty and self-determination. However, at the same time, Catholic teaching maintains that those fleeing violence, persecution, and other affronts to human dignity should be protected, and the preservation of human life is paramount. The USCCB has repeatedly

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<sup>1</sup> Circumvention of Legal Pathways, 88 Fed. Reg. 11,704 (Feb. 23, 2023).

<sup>2</sup> Matthew 25:35.

affirmed the right to seek asylum and is thus deeply troubled by policy changes that undermine that right, including many of the changes presented in this NPRM.

In 2019, DHS and DOJ published an Interim Final Rule on “Asylum Eligibility and Procedural Modifications” (“2019 Rule”) that proposed changes similar to those in this NPRM. The USCCB submitted formal comments in opposition to the 2019 Rule, finding that it conflicted with explicit provisions of the Immigration and Nationality Act (“INA”), violated our nation’s obligations under international law, failed to consider the root causes of migration, threatened vulnerable individuals and family unity, and violated the United States’ longstanding role as a global leader in humanitarian protection. We believe the same to be true of this proposed Rule.<sup>3</sup> Though DHS and DOJ have introduced conditions and exceptions in this NPRM that differentiate it from the 2019 Rule, we do not find that they are sufficient to make the NPRM compliant with U.S. refugee law and international obligations. Specifically, allowing the presumption of ineligibility to be rebutted in limited instances, the exceptions made for parole applicants from certain countries, implementation of the CBP One mobile application, and an exception for unaccompanied children do not make this NPRM lawful, humane, or just.

For these reasons, we strongly urge DHS and DOJ not to proceed with implementing this proposed Rule.

#### **I. The Addition of a Rebuttable Presumption Places an Impermissible Heightened Burden of Proof on Asylum Seekers and Threatens the Safety of Thousands.**

The Rule proposes making the right to apply for asylum conditional on having previously sought asylum in a country that an individual traveled through on his or her way to the United States. This presumption of ineligibility is rebuttable if the noncitizen is an unaccompanied child, was authorized to travel to the United States pursuant to a parole process, the mechanism for scheduling was not possible to access or use, was denied asylum in a previous transit country, or if the noncitizen or a member of the noncitizen’s family experienced an “acute medical emergency; faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or satisfied the definition of ‘victim of a severe form of trafficking in persons’ provided in 8 CFR 214.11.”<sup>4</sup>

To rebut the presumption of asylum ineligibility on the basis of a technical CBP One application failure or because of an imminent threat, the asylum seeker must demonstrate that it was impossible to use the application or that the threat posed to life was general, rather than imminent, by a preponderance of evidence.<sup>5</sup> This places a significant burden of proof on vulnerable asylum seekers who in most cases will not have access to counsel to assist them with navigating such a burden.

The proposed addition of this burden on asylum seekers by the Departments introduces a far higher standard than is statutorily required. First, it eviscerates the right to apply for asylum

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<sup>3</sup> Comments on “Asylum Eligibility and Procedural Modifications” (Aug. 14, 2019), <https://www.usccb.org/sites/default/files/about/general-counsel/rulemaking/upload/USCCB-Asylum-Comments-8-5-19.pdf>.

<sup>4</sup> Circumvention of Legal Pathways, *supra* n. 1, at 11,707.

<sup>5</sup> *Id.*

*regardless* of method of entry in favor of providing a presumption to those asylum seekers who came with a pre-scheduled appointment or with parole.<sup>6</sup> Secondly, it implicitly adds a documented evidentiary requirement that is more stringent than the requirement set by Congress. Congress has stated that an asylum seeker's testimony without corroboration is sufficient to qualify for asylum.<sup>7</sup> This rule implicitly requires documented corroboration of qualification for the presumption. Third, it leaves an asylum seeker entirely at the discretion of asylum officers when determining whether the asylum seeker has overcome this burden, as the regulation does not attempt to explain what documentary evidence is required to overcome the presumption against asylum. Lastly, the rule creates an impermissible "extraordinary" or "imminent" persecution requirement to overcome the presumption against eligibility that would render virtually all Central and South American asylum applications ineligible for asylum. These proposals further erode asylum seekers' due process rights in a manner inconsistent with congressional intent and our country's international obligations.

Imminence and severity are not qualifications to persecution under U.S. law. These exceptions, provided in only the most severe circumstances, simultaneously condition the right to seek asylum in a way that is not enumerated in the law and invalidate the claims of asylum seekers who could not wait until their persecutors imminently threatened rape, kidnapping, murder, or torture, at which point harm is likely to be suffered. The imposition of such conditions on asylum and the proposed increase in the burden of proof will pose substantial risks to human life, especially for those without legal assistance to defend their claims.

## **II. Required Use of the CBP One Application Violates U.S. Refugee Law, Denies Asylum Access to the Most Vulnerable Populations, and Separates Families.**

Requiring asylum seekers to use the CBP One application in order to present their asylum claim is unlawful. The Rule proposes that an asylum seeker is not subject to a rebuttable presumption of ineligibility if the asylum seeker avails himself or herself of established processes, including arriving at a port of entry at a prescheduled time and place by using the CBP One application or demonstrating that he or she was unable to access or use the application.<sup>8</sup> Requiring asylum seekers to meet this, or any condition, to be able to access the asylum process is a violation of U.S. law. Pursuant to the INA, to be eligible for asylum, an individual need only be present in the United States or arrive in the country at or between a port of entry.<sup>9</sup>

Further, mandatory use of the CBP One application is inherently prohibitive for the majority of asylum seekers arriving at the U.S.-Mexico border. To access CBP One, an asylum seeker must: (1) be in possession of a compatible smartphone or a similar device capable of downloading and installing applications; (2) must have the cognitive and physical ability to use a smartphone or similar device; (3) must have access to a stable Wi-Fi connection or cellular data to be able to download the application; (4) must first create an account at Login.gov in order to access CBP One; (5) must have access to Wi-Fi or cellular data for a prolonged period of time in order to

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<sup>6</sup> See 8 U.S.C § 1158 (wherein Congress very clearly established that "any alien" can apply for asylum "whether or not [the applicant arrived] at a designated port of arrival").

<sup>7</sup> *Id.*

<sup>8</sup> Circumvention of Legal Pathways, *supra* n. 1, at 11,723.

<sup>9</sup> 8 U.S.C § 1158.

fill out the biographical information needed for scheduling; and (6) must know English, Spanish, or Haitian Creole.<sup>10</sup> Any one of these logistical hurdles could prevent an individual from accessing CBP One and ultimately impede him or her from presenting a bona fide asylum claim. The NPRM carves out an exception for use of CBP One if an asylum seeker can prove through a preponderance of the evidence that he or she was unable to access the application due to a language barrier, illiteracy, significant technical failure, or other ongoing or significant obstacle.<sup>11</sup> However, the Departments do not specify what form the evidence can take or the process through which an asylum seeker can present this appeal.

In addition to logistical obstacles, the CBP One application itself contains a myriad of flaws and shortcomings that effectively limit access to asylum for some of the most vulnerable asylum seekers. Most concerning is the application's use of "liveness checks," which require individuals trying to schedule appointments at the U.S.-Mexico border to submit a photo of themselves to ensure that the request is being made by a "live person."<sup>12</sup> This feature of CBP One has proven to be deeply flawed. Advocates assisting African and Haitian asylum seekers have reported that the application does not recognize the faces of black migrants and those with darker skin colors.<sup>13</sup> One advocate described helping a Haitian family and a Venezuelan family with the liveness check for almost two hours, but their faces were never recognized.<sup>14</sup> Black asylum seekers face especially harrowing conditions in transit countries, such as Mexico, where they experience racism, discrimination, higher rates of violence, and are targeted by officials and cartels due to their race and nationality.<sup>15</sup> Further, black migrants in Mexico are often targeted by criminal groups and extorted by local law enforcement.<sup>16</sup> Black asylum seekers are at an increased risk of violence while they wait to seek asylum and yet are also most likely to encounter insurmountable obstacles in scheduling an arrival time using CBP One.

Some have also drawn comparisons between the CBP One scheduling model and the Trump Administration's "metering" policy, which allowed only a few migrants into the U.S. daily to be processed by DHS, forcing all others to wait in Mexico for their turn.<sup>17</sup> This was ultimately ruled to be illegal and a violation of migrants' due process rights.<sup>18</sup> In this digital version, DHS releases dozens of new appointment times every day at 6 a.m., but hundreds of asylum seekers log

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<sup>10</sup> Jack Herrera, *Fleeing for Your Life? There's an App for That*, TEXAS MONTHLY (Mar. 2, 2023), <https://www.texasmonthly.com/news-politics/cbp-app-asylum-biden-administration/>.

<sup>11</sup> Circumvention of Legal Pathways, *supra* n. 1, at 11,723.

<sup>12</sup> AMERICAN IMMIGRATION COUNCIL, CBP ONE: AN OVERVIEW 5 (Feb. 2023), [https://www.americanimmigrationcouncil.org/sites/default/files/research/2022-11-22\\_cbp\\_one\\_fact\\_sheet\\_feb\\_2023\\_update.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/2022-11-22_cbp_one_fact_sheet_feb_2023_update.pdf).

<sup>13</sup> *Id.*

<sup>14</sup> Bernd Debusmann Jr., *At U.S. Border, Tech Issues Plague New Migrant Applications*, BBC NEWS (Mar. 2023), <https://www.bbc.com/news/world-us-canada-64814095>.

<sup>15</sup> HUMAN RIGHTS FIRST, CERD: U.S. DISCRIMINATION AGAINST BLACK MIGRANTS, REFUGEES AND ASYLUM SEEKERS AT THE BORDER AND BEYOND (Aug. 8, 2022), <https://humanrightsfirst.org/library/cerd-us-discrimination-against-black-migrants-refugees-and-asylum-seekers-at-the-border-and-beyond/>.

<sup>16</sup> Caitlyn Yates & Jessica Bolter, *African Migration Through the Americas Drivers, Routes, and Policy Responses*, 34 MIGRATION POLICY INSTITUTE (Oct. 2021), [https://www.migrationpolicy.org/sites/default/files/publications/mpi-african-migration-americas-eng\\_final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/mpi-african-migration-americas-eng_final.pdf).

<sup>17</sup> Herrera, *supra* n. 10.

<sup>18</sup> *Al Otro Lado, et al. v. Mayorkas*, No. 17-cv-02366-BAS-KSC (S. D. Cal. Sept. 2, 2021).

on to schedule an appointment at the same time.<sup>19</sup> Many receive an error message (in English) as the overloaded system crashes.<sup>20</sup> If asylum seekers are able to successfully schedule an appointment, it is often weeks away.<sup>21</sup> There has already been one reported death of an asylum seeker waiting for his CBP One appointment.<sup>22</sup>

CPB One also poses a threat to family unity. In its current implementation, family members struggle to schedule appointments at the same time.<sup>23</sup> All members of a family are required to have confirmed appointments for the same time, but given the high demand for scheduling appointments, many have found that it is impossible to secure the necessary slots for the whole family. Some families have found themselves in a situation where parents might have a confirmed appointment, while their children do not, forcing them to choose between their unity and the safety of individuals.<sup>24</sup>

While the Departments cite processing efficiencies and expanded capability through the use of CBP One,<sup>25</sup> in practice, the application jeopardizes lives and inhibits due process. It should not become a mechanism upon which thousands of vulnerable migrants are required to place their hope for protection. Such a reality would be unlawful and does not reflect the values our country has long embraced and promoted.

### **III. The Imposition of a Parole Process via a National Origin Quota System for Asylum is Inconsistent With 8 U.S.C. § 1158 and Most Harms Central and South American Asylum Seekers.**

The designation of the title “Circumvention of Legal Pathways” for a regulation that applies to asylum seekers already begins to discount 8 U.S.C. § 1158, which permits any migrant present in the United States, irrespective of prior presentation at a port of entry, to apply for asylum. The proposed rule’s linkage of newly available parole processes with a decrease in the number of border encounters implies a degree of accessibility to these processes among asylum seekers that would therefore justify a broad regulation greatly restricting the right to seek asylum. The statute governing asylum does not include a nationality-based limitation on the right to seek asylum, and 8 U.S.C. § 1158 provides the right to seek asylum to anyone physically present in the United States, regardless of method of entry.<sup>26</sup>

Noting a correlation between the administration of new parole processes and a drop in encounters suggests a remedy where in fact only a symptom has been addressed. Uniting for

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<sup>19</sup> Elliot Spagat, *Online System To Seek Asylum At U.S. Border Overwhelmed With Errors, Heavy Traffic* PBS NEWS (Jan. 28, 2023), <https://www.pbs.org/newshour/nation/online-system-to-seek-asylum-at-u-s-border-overwhelmed-with-errors-heavy-traffic>.

<sup>20</sup> *Id.*

<sup>21</sup> Herrera, *supra* n. 10.

<sup>22</sup> *Id.*

<sup>23</sup> Andrea Castillo, *Asylum Seekers Face Decision to Split Up Families Or Wait Indefinitely Under New Border Policy* (Feb. 24, 2023) <https://www.latimes.com/politics/story/2023-02-24/asylum-seeking-families-consider-separation-shortage-mobile-app-appointments>.

<sup>24</sup> *Id.*

<sup>25</sup> Circumvention of Legal Pathways, *supra* n. 1, at 11,719.

<sup>26</sup> *O.A. v. Trump*, 404 F. Supp. 3d 109, 150 (D.D.C. 2019) (“[I]f any incongruity exists between the terms of the statute and a regulation, the statutory text prevails.”).



Ukraine and the Cuban, Haitian, Nicaraguan, and Venezuelan (CHNV) processes are expressly mentioned as providing lessons from which the rule draws. While laudable for their provision of temporary protection for those fleeing harm, they do not justify the dismissal of domestic and international laws that guarantee the right to seek asylum. In fact, the CHNV processes pose several barriers for the most vulnerable asylum seekers and, when contrasted with the Uniting for Ukraine program, reveal major disparities between the processes.

Cubans, Haitians, Nicaraguans, and Venezuelans who desire to be paroled into the United States must have a U.S.-based financial supporter, an unexpired passport, and funds to purchase their own commercial plane ticket to arrive at a port of entry in the interior of the country. Those most vulnerable and in urgent need of asylum to escape persecution often lack the requisite connections in the United States and an abundance of funds from which they can readily purchase plane tickets. Further, the process only allows admission of 30,000 eligible individuals from all four nationalities per month. In contrast, per USCIS, “there are no numerical limits on requests for travel authorization or parole under Uniting for Ukraine. The U.S. government is committed to providing Ukrainians displaced as a result of Russia’s invasion a full range of legal pathways, including parole, immigrant and nonimmigrant visas, and the U.S. Refugee Admissions Program, in accordance with U.S. laws.”<sup>27</sup> Ukrainians admitted under Uniting for Ukraine are also eligible for work authorization incident to the grant of parole, whereas those paroled under the CHNV processes are authorized only per the discretion of DHS. We urge the Departments to count not only the number of encounters at the border but the grave human cost of restricting asylum and disparate treatment between nationality-based programs.

#### **IV. The Proposed Rule Will Force Asylum Seeking Families to Make the Difficult Choice Between Presenting as a Family Unit or Sending Children to Seek Protection Alone.**

Family unity is a cornerstone of the American immigration system, but in the last several years a number of policies have undermined this principle. While we commend the Departments for excluding unaccompanied children from application of the rebuttable presumption, we are gravely concerned about the family separations that will occur based on this exemption and the threat that it poses to family unity.

Exempting unaccompanied children from policies such as this often leads to “self-separations” of family members, a reality that migrant families have been grappling with since the onset of the Migrant Protection Protocols (MPP) in 2019. Under MPP, unaccompanied children were exempt from being returned to Mexico to wait for their day in immigration court. As a result, in early 2020, there were multiple reports of children entering the United States alone, even though they had arrived at the U.S.-Mexico border as part of a family unit. Often, these “self-separations” occurred because some parents disappeared or because relatives decided that the conditions in Mexico were too dangerous for children to continue to wait there.<sup>28</sup> Family separations of this

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<sup>27</sup> U.S. CITIZEN AND IMMIGRATION SERV., FREQUENTLY ASKED QUESTIONS ABOUT UNITING FOR UKRAINE (2023), <https://www.uscis.gov/humanitarian/uniting-for-ukraine/frequently-asked-questions-about-uniting-for-ukraine>.

<sup>28</sup> Priscilla Alvarez, *At Least 350 Children of Migrant Families Forced to Remain in Mexico Have Crossed Over Alone to U.S.*, CNN (Jan. 24, 2020), <https://cnn.it/3Ko42hg>.

nature continued to occur under Title 42.<sup>29</sup> While unaccompanied children were initially subject to expulsion under the policy, the practice was officially discontinued in early 2021. Subsequently, the Department of Health and Human Services' Office of Refugee Resettlement experienced an historic influx of unaccompanied children in their custody.

The Rule proposes conditions that will undoubtedly lead families to make similar decisions in a desperate attempt to keep their children safe. The unnecessary separation of families is in direct conflict with child welfare principles and causes children and their families long-term harm.<sup>30</sup> The implementation of a policy that would foment any such separations is inhumane and unacceptable.

## Conclusion

For these reasons, this NPRM is unlawful, unjust, and unwise, and we ask the Departments to rescind it in its entirety. The ways in which we respond to asylum seekers arriving at our border is a test of our moral character. As Pope Francis recently stated, “safe, orderly, regular and sustainable migration is in the interest of all countries. If this is not recognized, there is a risk that fear will erase people’s future and justify those barriers against which lives are shattered.”<sup>31</sup> It is in that same spirit that we urge you to uphold the right to seek asylum, consistent with the common good, while providing realizable and equitable legal pathways for those without viable asylum claims.

Respectfully submitted,



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<sup>29</sup> Camilo Montoya-Galvez, *12,212 Migrant Children Reentered U.S. Border Custody Alone in 2021 After Being Expelled*, CBS NEWS (May 20, 2022), <https://www.cbsnews.com/news/immigration-migrant-children-us-border-custody-unaccompanied-minors-2021/>; see also Brief for the United States Conference of Catholic Bishops & Catholic Legal Immigration Network, Inc., Supporting Respondents, *Arizona v. Mayorkas* (U.S. 2023), [https://www.usccb.org/sites/default/files/about/general-counsel/amicus-briefs/upload/2023-0208\\_FINAL\\_Title\\_42\\_Brief\\_USCCB%20CLINIC.pdf](https://www.usccb.org/sites/default/files/about/general-counsel/amicus-briefs/upload/2023-0208_FINAL_Title_42_Brief_USCCB%20CLINIC.pdf).

<sup>30</sup> Jordan P. Davis, Tara M. Dumas & Brent W. Roberts, *Adverse Childhood Experiences and Development in Emerging Adulthood*, 6 EMERGING ADULTHOOD 223–234 (2017) (finding that the impact of trauma can be compounded and that children can experience the effects of trauma long-term, across various domains in their lives including education, physical health, mental health, relationally, and more).

<sup>31</sup> Pope Francis, Address to Refugees Arriving in Europe through Humanitarian Corridors and Representatives of Receiving Institutions and Communities (Mar. 18, 2023), <https://www.vatican.va/content/francesco/en/speeches/2023/march/documents/20230318-famiglie-rifugiate.html>.